IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6298 OF 2003

Smt. Prabhavati Ganpat Tambe & Ors....Petitioners.

V/s.

Anand Govind Karande. ...Respondent.

Shri A.S.Khandeparkar,Advocate for Petitioners.

CORAM: D.G.KARNIK,J

DATE : 23rd August,2004.

P.C. :

1. Heard the learned Counsel for the petitioners. By an order dated 22nd September, 2003, this Court directed issuance of notice to the respondent indicating that the petition would heard and disposed of at the stage of admission. Inspite of service of notice, the respondent has not appeared. Petition is therefore, heard in the absence of respondent.

2. By this petition, the petitioners challenge the Order dated 11th June, 2002 passed by the Learned Additional District Judge, Kalyan rejecting the Misc.

Civil Application No.12 of 2002 for condonation of delay of 55 days in filing an appeal against the judgment and order of the learned Civil Judge, Junior Division, Kalyan in Regular Civil Suit No. 295 of 1998.

3. The Regular Civil Suit No. 295 of 1998 was decided by the Trial court by a judgment and order dated 20th December, 2001 and Appeal was filed 55 days too late by the petitioners herein alongwith an application for condonation of delay. The appellate Court dismissed the application for condonation of delay principally on two grounds which are considered below.

4. In the application before the appellate Court, it was pleaded that the petitioner No.1 was ill from 25th January, 2002 and therefore, petitioners could not file the appeal in time. The Court held that as the suit was decided on 20th December, 2001, the period of limitation for filing an appeal expired on 19th January, 2002. The petitioner No.1 fell ill after the period of limitation i.e. on 25th January, 2002. Hence the illness could not be ground for condonation of delay. Under Section 12(2) of the Limitation Act while calculating the period of

limitation, time required for obtaining certified copy of the order is required to be excluded. The petitioner No.1 applied for certified copy on 4th January, 2002 and the certified copy was ready on 17th January, 2002. If the said period is excluded the period of limitation for filing an appeal would not have expired on 19th January, 2002 as held by the appellate Court but the appeal could have been filed upto 31st January, 2002. The applicant no.1 fell ill before the expiry of period of limitation. Therefore, the appellate Court would not have rejected the application on the ground that the applicant fell ill after the period of limitation.

5. The Court also held that only the petitioner No.1 was ill and the petitioner Nos.2 to 5 who were her children were not ill and they could have filed the appeal. If the petitioner No.1 had sufficient cause for filing an appeal late, then delay caused in filing of the appeal by her had to be condoned. the petitioner No.1 individually alone could have filed the appeal arranging the petitioner nos.2 to 5 as respondents. If she has done so, then there would have been no cause for rejecting the application for condonation of delay made by her. The appellate Court should have been a bit more liberal especially when

the delay was only of a few days.

6. In the circumstances, the Writ Petition is allowed. The impugned order dated 11th June, 2002 in Misc.Civil Application No.12 of 2002 is set aside. The delay in filing the Appeal is condoned. The appeal be numbered and heard by the appellate Court on its own merit.

(D.G.KARNIK,J)